Supreme Court, U. S.
FILED
APR 4 1978
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1210

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

MANUFACTURERS HANOVER TRUST COMPANY,

Respondent.

REPLY BRIEF

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REPLY BRIEF

Respondent's Brief in Opposition makes only one assertion: the question whether petitioner proved its affirmative defense of having taken "all necessary measures to avoid the damage" pursuant to Article 20 of the Warsaw Convention is one of fact. Petitioner agrees that whether a party meets its burden of proof usually is a question of fact. But, if the wrong legal standard is applied, the factual evaluations made thereon are erroneous. As the Court stated in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson,* 390 U.S. 414 (1968):

> Evaluations of evidence reached by accurate application of erroneous legal standards are erroneous evaluations.

390 U.S. at 444-45.

This case is important because the District Court, by erroneously interpreting a treaty of the United States, has imposed a legal standard upon all airlines that is *impossible to meet*. It is impossible to meet because it requires an airline to take all economically reasonable measures to protect against an armed robbery of a cargo facility whether or not those measures would actually prevent or avoid the robbery.

More importantly, however, the District Court's interpretation of the treaty does away with the fault concept that is the foundation of the Warsaw Convention system of liability. The District Court found Alitalia liable for the loss occasioned by the armed robbery on the basis of its failure to take two measures that the court refused to find would have prevented or avoided the loss. The District Court did not find that petitioner was negligent; rather, it found that petitioner's employees acted non-negligently. The District Court did not find that petitioner did not meet the reasonable care required of an airline in protecting high-value cargo; rather, the District Court found that petitioner met or exceeded industry standards. The District Court did not find a single measure that was so important in avoiding the damage that the industry standard of care was, as a whole, inadequate[1]; in fact, the District

[1] In this regard all of the admiralty cases cited by respondent are opposed to the District Court's decision. In those cases the courts found that the ship owner did not meet the industry standard of care: *Ore Steamship Corporation* v. *D/S A/S Hassel*, 137 F.2d 326 (2d Cir. 1943) (superficial inspection held inadequate); *The Anaconda*, 60 F.2d 898 (2d Cir. 1932) (superficial inspection held inadequate); *General Foods Corporation* v. *The Troubador*, 98 F.Supp. 207 at 211 (S.D.N.Y. 1951) (superficial inspection held inadequate and ventilation not up to industry standard). For example, in *California & Hawaiian Sugar R. Corp.* v. *Winco Tankers, Inc.*, 278 F.Supp. 648, 653 (E.D.La. 1968), the court held that due diligence is "what a reasonably prudent vessel owner would have done."

Court refused to find that either of the measures suggested by respondent would even have avoided the loss.

Neither respondent nor the District Court found a single measure, which petitioner's failure to take, caused the loss. In short, no fault of petitioner was established in the trial court. Rather, petitioner was found liable because it failed to take *"all reasonable measures"* regardless of whether those measures would have avoided the damage. Yet, to avoid liability, the Warsaw Convention requires only that a carrier show that it took reasonable "measures *to avoid the damage*".

This case presents not a question of fact, but rather an important question of the legal standard imposed by a treaty of the United States upon airlines with respect to the transportation of cargo. The District Court, has created a standard of care—all reasonable measures whether or not they avoid the damage—that will, as a practical matter, be impossible for an airline to meet[2]. The airline industry ships literally millions of dollars worth of high-value cargo, out of J.F.K. International Airport alone, each day. The ramifications of the decisions below and the impossible legal standard created by the District Court's erroneous interpretation of a treaty of the United States far transcend the particular interests of the parties to this action.

[2] It is interesting that one of the two "reasonable" measures suggested by respondent—restricted access—is not practiced by its own facilities (banks) which are held by the law to a higher standard of care than airlines.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case, as prayed herein.

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Certificate of Service

I hereby certify that I have, this 3rd day of April, 1978, served the foregoing Reply Brief upon respondent by depositing same in a United States mailbox at 1 Rockefeller Plaza, New York, New York 10020, with first class postage prepaid, addressed to:

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April 3, 1978

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